TOPICAL INDEX.

PAGE

Statement of Facts 3

Facts Affecting Land in Issue 6

Jurisdiction 8

I.

Law and Argument 8

II.

Cases cited by Respondents are not in point 10

III.

Nature of preference right granted to landowners in section 20 13

IV.

Section 20 of the Leasing Act is mandatory 20

V.

The substitution of petitioner would not interfere with the functions of the Land Department 22

VI.

The decision of jurisdiction controls other issues 28

VII.

The preference right vested only in entrymen and patentees subject to the Act of July, 1914 29

VIII.

Petitioner's case 41

IX.

Respondent's theory 52

X.

Construction of statute 63

Conclusion

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Adams v. Church (1903), 193 U. S. 510 44
Alaska Oil Fields v. Rains, 54 Fed. (2d) 868 ..... 8, 9, 21
Albert Woodhouse, 41 L. D. 145 56
Alvina L. Kamen, 48 L. D. 628 64
Anderson v. Carkins, 135 U. S. 483 47
Anderson v. Clune (1925), 269 U. S. 141 (70 L. Ed. 201) 18
Bardon v. Nor. Pac., 154 U. S. 288 49
Benjamin Kohal (1923), 49 L. D. 460 ..... 31, 56
Burke v. Sou. Pac. (1913), 234 U. S. 1527 49
Chaplin v. United States (1912, 9 C. C. A.), 193 Fed. 879 36
Charles L. Stevens, 48 L. D. 110 17
Chas. S. Morrison, 36 L. D. 126 17
Cleveland Johnson, 48 L. D. 18 64
Correa v. Barbour (1934), 71 Fed. (2d) 9 12
Cowell v. Lommers, 21 Fed. 200 49
Dealy v. U. S., 152 U. S. 539 36
Deffeback v. Hawke, 115 U. S. 392 51
Franden 50, L. D. 520 39
Fraser and Harvey, 48 L. D. 237 19
Garfield v. Goldsby, 211 U. S. 249 12
George Frandsen (1924), 50 L. D. 516 56
Glen Falls Cement Co. v. Van Wert, 228 N. Y. S. 289 66
Great West. R. R. v. Swindon (1885), 9 App. cases 808 65
Hastings R. R. v. Whitney, 132 U. S. 357 ..... 36, 45
Hawley v. Diller, 178 U. S. 478 ..... 45, 47
Hockman v. Sunhew Petroleum Corp., 11 Pac. (2d) 778 21
Holmes v. Kinsey (1912), 40 L. D. 557 56
Iddings v. Burns, 8 L. D. 226 36
Iselin v. United States (1925), 270 U. S. 245 65

PAGE

Jennie Tschirgi (1912), 41 L. D. 319 56
Johnson v. Northern Pacific (1911), 40 L. D. 321 56
Johnson v. Riddle, 240 U. S. 467 49
Johnson v. So. Pac. (1904), 196 U. S. 369 65
Knight v. Land Assoc., 142 U. S. 161, L. Ed. 948 49
40, L. D. 321 43
41, L. D. 145 43
46 L. D. 274 18
Lane v. Hoglund, 244 U. S. 174, 61 L. Ed. 1067 31
Matt Mechaley, 51 L. D. 415 ..... 16, 22
McCoskell v. Herron (1905, Iowa), 103 N. W. 988 36
Meydenbauer v. Stevens, 78 Fed. 787 12
Myers v. Croft, 80 U. S. 291—20 L. Ed. 562 47
Neal v. Hodges, 13 Fed. Supp. 916 28
Neff v. U. S. (1908), 165 Fed. 273 45
Oregon v. Hitchcock, 202 U. S. 70 10
Osburn v. Bank of U. S., 9 Wheat. 738 12
Patterson, Estate of, 155 Cal. 626 66
Peabody Mining Co. v. Gold, 111 Fed. 819 48
Pollack v. Mansfield, 44 Cal. 36 12
Porto Rica R. R. v. Mor (1921), 253 U. S. 245 65
Ruckman v. Cory, 129 U. S. 387 28
Shaw v. Rink, 50 L. D. 411 16
Simmons Creek Coal Co. v. Doran, 142 U. S. 417 28
Skeen v. Lynch, 46 Fed. (2d) 1044 8
South Penn Oil Co. v. Miller, 175 Fed. 729 ..... 10, 11
St. Louis Smelting Co. v. Kemp, 104 U. S. 636 49
Standard Oil v. St. Oil Co., 72 Fed. (2d) 524 28
State of Louisiana, 30 L. D. 627 45
Steel v. Smelting Co., 106 U. S. 447 49
Stockley v. United States, 271 Fed. 632 31

PAGE

Stockley v. United States (1923), 260 U. S. 531, 67 L. Ed. 390 31
Thomas Stockley (1915), 44 L. D. 178 31
United States v. Beaman, 242 Fed. 876 48
United States v. Detroit Co., 200 U. S. 321 35
United States v. George, 228 U. S. 14 29
United States v. Hearing (C. C., Oregon), 26 Fed. 714 47
United States v. Minor, 114 U. S. 232 45
United States v. Mo. Pac. R. R. (1927), 278 U. S. 269 65
United States v. Morehead, 243 U. S. 607 47
United States v. Nelson, 199 Fed. 464 47
United States v. Oregon R. R. (9th Circuit), (1911), 186 Fed. 861 49
United States v. Smull, 236 U. S. 405 46
United States v. Standard Brewery (1920), 251 U. S. 10 65
United States v. Winona R. R., 67 Fed. 948 45
Wabash R. R. v. United States, 178 Fed. 5 65
West v. Standard Oil (1928), 278 U. S. 200 49
Whitcomb v. White, 214 U. S. 15 49
Whitman v. Spear (1925), 103 So. 668 36
Wilbur v. Krushnic, 280 U. S. 306 29
William Moses (1915), 41 L. D. 483 56
Williamson v. U. S., 207 U. S. 425 47
Witbeck v. Hardeman, 51 Fed. (2d) 450, affirmed in 286 U. S. 444 ..... 8, 9, 21
Work v. Louisiana, 269 U. S. 250 12

STATUTES.

Civil Code, Sec. 1573 5

TEXT BOOKS AND ENCYCLOPEDIAS.

Black's Law Dictionary 66
59 Corpus Juris 986 65

INDEX TO APPENDIX.

PAGE

Page 371 of Official Bulletin 623, published 1917 by Department of Interior, Affecting Land in Issue 69

Statutes 72

General Land Laws 72

Preemption Act, Sept. 4, 1841 (5 Stats. at Large, 456) 72

Revised Statutes, Sec. 2302 72

Compiled Statutes 1901, p. 1410 72

6 Fed. Stat. Ann. 321 72

Mineral Land Laws 72

Revised Statutes, Sec. 2318, Title 30, Chap. 2, Sec. 21, U. S. C. A. 72

Act of Feb. 19, 1909, Sec. 218, Title 43, U. S. C. A. Enlarged entries of certain nonmineral, nonirrigable lands in certain states 73

Sec. 220, Title 43, U. S. C. A. Applications for entry of lands not designated as subject to entry and for additional entry of contiguous land 74

Pickett Act. Act of June 25th, 1910, Sec. 141. Withdrawal and reservation of lands for water-power sites or other purposes 75

Leasing Act, Feb. 25, 1920 (S. 2775). An act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain 76

Act of July 17, 1914. An act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals 77

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 2.

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith, et al.,

Defendants.

Upon Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONER'S SUPPLEMENTARY BRIEF.

STATEMENT OF FACTS.

In this Supplementary Brief, petitioner, in the interest of brevity, will not repeat the statement of facts set forth

in his brief in support of the Petition for Writ of Certiorari. All the facts necessary to determine the issue of jurisdiction are contained therein.

We call attention, however, to the statement found on page 4 of respondent's brief in opposition to the writ which we quote:

> "It (the Bill) does not allege that the petitioner ever made application to the Land Department for a prospecting permit or lease, and the proof adduced at the trial shows that no such application was ever made by petitioner. The Bill does not allege that any of the respondents fraudulently prevented or attempted to prevent petitioner from obtaining from the United States either a prospecting permit or an oil and gas lease covering the land involved."

From the respondents' theory of law as to the nature of a preference right granted to the landowner in Section 20 (App.), the above facts would be pertinent to the issue of jurisdiction, since they would affect the discretion of the Secretary of the Interior in recognizing a preference right. Petitioner's theory is that it was not necessary for him to make application for a prospecting permit, since by the statute he was granted a vested property right. This property right could be divested only by an adverse applicant after personal service of notice and posting of bond in compliance with the provisions of the applicable regulations which have the force and effect of law. As these regulations provide the machinery for forfeiture, they require strict interpretation.

Unless this notice be given, there arises the unsupportable situation of a grantee of a preference right by Congress being deprived of his vested property right without due process of law.

It is wholly immaterial to the issue of jurisdiction whether there was actual fraud, constructive fraud, or mistake of law. The complaint does allege "that on or about the 28th day of May, 1921, defendant Thomas M. Crum illegally and wrongfully, and with knowledge of complainant's right", procured a permit in violation of complainant's right, for the reason that no personal notice was given to complainant by defendants, or no notice of any kind. [R. 9.]

Section 1573 of the California Civil Code provides that constructive fraud consists:

> "(1) In any breach of duty which, without actual fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him."

One of the issues in the trial of the case was the element of fraud, and one of the assignments of error is based upon fraud. In his application for a permit, one of the defendants made false affidavit to the Land Department that petitioner was not claiming a preference right, and that he had made a thorough investigation to ascertain that fact. [R. 213.] On the witness stand, this same defendant testified, however, that he had not given

petitioner any notice at any time regarding his application. Notice is knowledge. This situation clearly implies fraud, and the inference is that notice was not given in order to prevent the matter coming before the Land Department for decision. It is significant that in the decree naming the defendants upon whose part there was no fraud, the name of Thomas M. Crum is omitted. The proof disclosed, further, that petitioner claimed a preference right and relied upon compliance with such notice made for his protection. [R. 107.]

Irrespective, however, as to whether there was actual fraud, or merely constructive fraud resulting from a breach of legal duty, that fact is wholly immaterial to the issue of jurisdiction, as it has no bearing upon the question as to whether the United States is an interested party in the litigation such as to require its presence.

FACTS AFFECTING LAND IN ISSUE.

The Government surveys reported this land to be agricultural. No contest or protest was ever filed in the Land Office questioning its agricultural character. [R. 132.] In June, 1908, it was classified as agricultural by the Geological Survey which was the only classification as shown by the official record in the Land Office ever made prior to entry. [R. 158-175.] At the same date in 1908 other land in the same general region was classified as mineral and was then "withdrawn as mineral land" by operation of the mineral land laws (not an executive

order). [R. 267.] In December 1910 this land was again suspended "for classification", but according to the certified statement of the Geological Survey, was not thereafter classified as mineral. [R. 158.]

On March 6, 1919, petitioner filed application under the Act of February 19, 1909, which provides that the Secretary must determine that the land is "actually" non-mineral in character before issuing a patent. [App.] At this time petitioner filed affidavit and other evidence of non-mineral character in accordance with the provisions of Section 2 of the Act of July, 1914. [App.] Thereafter additional affidavits were filed and certificate of entry issued. In 1925 patent was issued with any prospective oil retained by the United States under a regulation which provided, "that notwithstanding such showing of (non-mineral character) if the Department shall conclude that the land has a prospective value, such action will be taken as the facts may warrant." [R. 191.] The sole question presented on the merits is one of law:

> Whether a homesteader's preference right to prospect under Sec. 20 on land determined to be non-mineral in character at the time of entry, is defeated by an executive order "for classification" issued prior to entry.

JURISDICTION.

I.

Law and Argument.

Question: Is the United States an indispensable party to a suit brought to declare a trust in an oil lease by the patentee of the land (Oil reserved to the U. S.) *vested* with a preference right to prospect for oil and to a lease in case of discovery, against a subsequent fraudulent permittee and lessee of the United States?

Three cases decided by different Circuit Courts of Appeal are controlling in the instant case on the issue of jurisdiction, these decisions being *Witbeck v. Hardeman,* 51 Fed. (2d) 450, affirmed in 286 U. S. 444; *Alaska Oil Fields v. Rains,* 54 Fed. (2d) 868; and *Skeen v. Lynch,* 46 Fed. (2d) 1044. An analysis of the facts of these cases is set forth on page 12 of petitioner's brief in support of the writ. The facts involved are similar to the case at bar to determine jurisdiction. In applying the law, the Circuit Courts held that the United States was not interested in the results of the suit, would not be injured by any decision rendered, and hence was not an indispensable party.

In reviewing the facts of the above cases it will be seen that in each of them, the United States was the owner and lessor of oil land, as in the case at bar. The United States had issued a permit or lease to the defendants. The plaintiffs were claiming the right to the lease and brought a Bill in Equity, without naming the lessor as a party defendant. The question presented in each case was, whether the United States, as lessor, had such an interest in the litigation as required its pres-

ence as a party defendant. The Circuit Courts held that the mere proprietary interest of the United States, as lessor, is not sufficient to require its presence as a party defendant. In each case it was urged that the United States had the right to select its lessee, that the substitution of another lessee by operation of law was an interference with the discretion of the Secretary, and that in being deprived of the exercise of this discretion, the United States would be injured. This is the gist of the argument urged by the respondents in the instant case. The reasoning given by Judge Sibley in *Witbeck v. Hardeman, supra,* beginning on page 450, fully answers this argument. In *Alaska Oil Fields v. Rains, supra,* the Ninth Circuit Court of Appeals adopted the same reasoning.

Judge Sibley points out that the issuance of the lease is the last act required of the Land Department, and in that respect it is akin to the issuance of a patent. Since the courts have always taken jurisdiction after a patent had been issued to ascertain whether granted to the wrong party through fraud, or mistake of law, and to afford relief in proper cases, the same reasoning applies in the case of a lease. He states, further, that the Secretary has no discretion in selecting the lessee, as Congress made the choice, and that the provisions of the law are mandatory. As the Secretary must recognize this preference right, perforce there is no interference with the functions of the Land Department, or no discretion violated by the substitution of the rightful party as lessee. This reasoning of the Court applies fully to the facts of the instant case. The trial court accepted the decision of *Witbeck v. Hardeman* as controlling, it having been, by inference, affirmed by this court. We believe that this reasoning is sound in principle and should be sustained.

II.

Cases Cited by Respondents Are Not in Point.

Respondents in their brief, in opposition to the writ, at pages 13 and 17, cite the case of *Oregon v. Hitchcock,* 202 U. S. 70, and *South Penn Oil Co. v. Miller,* 175 Fed. 729, as supporting the proposition that a lessor is a necessary party when the lease is involved, and that the United States is an indispensable party where it holds title, contrary to the decrees in the cases discussed above. In our opinion, an analysis of these decisions will show that they are in accord with the correct rule. These cases state the principle that jurisdiction must be determined by the effect of the judgment or decree which is to be entered. In the Oregon case, the suit was against the United States, as plaintiff sought to divest the United States of title. Herein Mr. Justice Brewer states:

> "The question of jurisdiction in a case very similar to this was fully considered in *Minnesota v. Hitchcock,* 185 U. S. 373, wherein we said:
>
> 'Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale,—to *divest the government of its title, and vest it in the state.* The United States is, therefore, the real party affected by the judgment, and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by *the result of the judgment or decree which may be entered,* the same rule must apply to the United States. The question whether the United States is a

party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered.'" (Italics ours.)

In the *South Penn Oil* case mentioned above, the court held that it could not adjudicate rights under conflicting oil leases of the same property executed by different lessors, in a suit between the lessees to which the lessors were not parties, as the title was necessarily involved. In this connection, the court states, at page 736:

"We also think the record discloses the fact that parties absolutely essential to the proper disposition of the questions decided by the court below were not before it, and that consequently, even had the subject-matter of the controversy been properly within its jurisdiction, the court could not have effectively disposed of it. Neither the lessors of the complainants, nor of the defendant, were made parties to the suit, and yet the final decree disposed of the funds in which they were interested, and decided *the title to the property which they claim to own in fee simple. It takes from the one and gives to the other set of claimants portions of the land claimed, respectively, by those not made parties. It adjudges that the complainants are the owners, by virtue of their leases for oil and gas,* of the real property in dispute that is located to the west of a certain line, although such property is claimed *in fee simple* by the lessors of the South Penn Oil Company, who were *not permitted to defend their titles* . . . Evidently the decree of the court below *could not finally and effectually dispose of the controversy, as the lessors referred to were indispensable parties, and those claiming under it would hold defective titles.*" (Italics ours.)

In principle, the cases above quoted are similar to the case of *Wilson v. Elk Coal Company*, cited by the lower court and discussed on page 23 of petitioner's brief in support of the writ. The plaintiff therein, in effect, sought title from the United States, and the relief could have been granted by the United States alone. A clear line of distinction exists between these cases, and the cases of *Witbeck v. Hardeman, Alaska Oil Fields v. Rains* (*supra*), and the instant case, wherein the plaintiff does not seek title, or anything which would injure the title of the United States. He is asking to be substituted for the lessees' interest only. The finality of any judgment rendered is not affected by the absence of the United States. This court has held repeatedly that the fact that the United States has title to the subject matter, does not make it an indispensable pary. The reasoning in the Louisiana case below is very pertinent to the instant case.

Work v. Louisiana, 269 U. S. 250;
Garfield v. Goldsby, 211 U. S. 249 at 261.

In the case at bar, there is no attempt to transfer the title of the United States. The contest is entirely between the parties litigant, and it in no way infringes the right, title or interest of the United States.

Correa v. Barbour (1934), 71 Fed. (2) 9;
Pollack v. Mansfield, 44 Cal. 36;
Meydenbauer v. Stevens, 78 Fed. 787;
Osburn v. Bank of U. S., 9 Wheat. 738.

In delivering the opinion of the court, in this last case cited, Chief Justice Marshall used the following language:

> "It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Where the right is in the plaintiff and the possession is in the defendant, the jury cannot be stopped by the mere assertion of title in a sovereign."

The cases cited are conclusive in establishing that the United States is not a necessary party where an officer or agent of the United States is in possession of the land in controversy, or by analogy, when he is a lessee.

III.

Nature of Preference Right Granted to Landowners in Section 20.

Two fundamentally different theories of law are presented herein as to the nature of the preference right granted in section 20 of the Leasing Act. As this question bears directly upon the issue as to the interest of the United States in the controversy, and the discretionary duties of the Secretary, we deem it important that this court determine that question.

Petitioner urges that the entryman's or patentee's preference right contained in section 20 of the statute is a vested property right of which he could be divested by an adverse applicant only by compliance with the provisions of law as to service of personal notice upon him. Respondents in distinction insist that it was a mere privilege or offer requiring acceptance, which the landowner acquired for the first time when he made appli-

cation therefor, and which could be extended or withheld at the discretion of the Secretary. In a brief before the lower court, it is stated:

> "The only preferential right that is assumed to be given by the Act is that, for a thirty-day period the agricultural entryman shall have a right to apply."

The above is contrary to the express intent of the statute where the words are, "shall be entitled to a preference," and not, "shall have a right to apply." This position is further emphasized on pages 8 and 9 of respondents' brief in opposition to the writ, wherein it is stated:

> "Hardeman did not pay his fee within the thirty days during which a preference was by law granted to him, and for those reasons the Secretary denied his application. It is obvious that this is quite different from a case of the court undertaking to make a decree where there has been no application in the Land Department by one of the contending parties, for *non constat* the Secretary would have granted, or would now grant, the application of petitioner for a permit or lease. For a court to make a decree in the case at bar would interfere directly with the function of the Land Department which, because of the failure of petitioner to make application, has never had the opportunity to pass upon his claim and has never had the opportunity to decide between applicants . . . In the case at bar the court is asked to take over the duties of the Land Department before that Department has had an opportunity to perform its function of deciding between two claimants. Petitioner seeks to have the court do away with the necessity of application to the Land Department by petitioner and to deny all control, all jurisdiction, and all discretion to the Secretary of the Interior."

It is evident from the above, that respondents urge that the homesteader in section 20 did not have a vested right, but they consider that such right was contingent upon a subsequent application by the patentee. This argument was presented to the lower court. It is a clear statement of respondents' position and contains the gist of their reasoning as to why the United States is an interested party, requiring its presence. Upon the basis of this argument the lower court dismissed the suit, in the absence of the United States, for want of jurisdiction.

Petitioner submits that the above theory is not sound in principle. It is contrary to the decisions of the Land Department relative to the nature of the preference right. It is contrary to the decisions of this court, where similar vested property rights were involved. The preference right was an absolute right to immediate possession and enjoyment. It was not subject to contingencies, as no further event could make this right more certain or secure. Since it is assumed, on the issue of jurisdiction, that petitioner had a preference right, how can this fact be reconciled with the above reasoning that he must have filed application in order to acquire it, and then that it was within the Secretary's discretion to refuse to grant it? This confusion of reasoning arises from section 13 of the Leasing Act, providing for a preference right of thirty days to strangers to the title who complied with certain requirements of law contained in that section. The preference right of section 20 vested a property right in certain entrymen and patentees when the act went into effect, regardless of any future action on their part.

The fundamental difference between a section 13 application for a prospecting permit and one under section 20 of the act is, that, whereas, an application under section 13

of the act is one presented upon the basis of "first come first served," and is based upon mere privilege by any stranger to the title, the provisions of section 20 grant a preference right to such a permit to an entryman or patentee under the terms of such act and is not based upon mere privilege, but upon rights growing out of preexisting laws. No duty rests upon the section 20 preference claimant to act until he has been served with notice of an adverse claim.

The pertinent part of section 20 and the regulation for its administration are set forth on page 11 of petitioner's brief in support of the writ. The language contained therein, "the patentee shall be entitled to a preference right to a permit," is mandatory. This language vested a right *eo instanti* when the act went into effect. This property right could be divested by an adverse applicant only by compliance with the provisions of law as to personal notice, whereupon the landowner had thirty days to exercise his right. No application was necessary and no time limit is placed upon its exercise. Petitioner is supported in this reasoning by the decisions of the Department.

In the case of *Matt Mechaley,* 51 L. D. 415, it is stated:

> "Section 20 of the Leasing Act did not place any limitation upon the time allowed *any entryman* to assert a preference, and that limitation is governed wholly by the presentation of adverse application."

Again, in *Shaw v. Rink,* 50 L. D. 411, the Department holds:

> "Not only is notice by an applicant expressly required, but the situation is one in which no warrant would exist for a regulation permitting persons not

themselves of record as intending in good faith to develop the mineral deposits, to place upon a surface owner the burden of exercising a preference conferred upon him by statute. The section pre-supposes an adverse claimant over whom the *entryman is to be preferred;* and a regulation which requires that the entryman exercise the preference on penalty of a waiver thereof, would only be authorized if necessary to accomplish the purpose of the Leasing Act, i. e., to encourage persons to develop the oil and gas deposits as provided."

In defining the term "preference," the Secretary of the Interior states:

"The term 'preference' is a familiar one under the Public Land Laws and means *exclusive.* The right thus secured, therefore, is to the exclusion of other persons; and it is evident, without argument, that the duration and extent of a right of that character should be strictly governed by the statute. The exclusive right *can be enlarged or diminished by Congress alone."*

Chas. S. Morrison, 36 L. D. 126, 128.

In the case of *Charles L. Stevens,* 48 L. D. 110, it is held that written notice or notice by publication by any adverse applicant must be "served upon entrymen or owners having a possible preferred right to a permit."

The preference right to prospect of the landowner is not a mere personal privilege which may be ignored by the Secretary, as respondents urge. It is a vested right, not a contingent one. It was a grant *in praesenti,* not *in futuro.* Strictly speaking, it is in the nature of an incorporeal hereditament, which attached to and issues out of the land. It has the quality of inheritance. In its

nature it is analogous to the Soldiers' Additional Homestead Statute, section 2306, Revised Statutes, which provides that every person entitled under the provisions of section 2304 to enter a homestead, who may have entered a quantity of less than 160 acres, "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres."

The Land Department for years, in interpreting the above statute, assumed that it was a mere offer or privilege requiring acceptance. Regarding this section, the Secretary once held, in 46 L. D. 274:

> "The benefit of Section 2306, indeed, is not before its acceptance property at all, and hence is not capable of inheritance. It is a mere offer, which upon its acceptance by a designated beneficiary during his term of qualification as such becomes property and convertible into specific land by entry under it."

In *Anderson v. Clune* (1925), 269 U. S. 141 (70 L. Ed. 201), Mr. Justice Sutherland does not take this view. Referring to the Department's interpretation, he says:

> "This is plainly in the face of the decisions of this court in Webster v. Luther, and others. . . . The grant of the statute (Sec. 2306) *ipso jure* vests a property right in the donee which he may exercise or sell and transfer. A property right, the ownership of which may be conveyed to and vested in a purchaser, must be accorded the quality of inheritability, which usually attaches as an incident of ownership in the absence of some provision of law to the contrary; and we, therefore, hold that the Soldiers'

> Additional Homestead right, if not exercised or transferred by the donee, passes to his estate as other property."

The terms "shall be entitled" of section 20, and "shall be permitted" of section 2306, appear to be synonymous. The grant under section 20, in stating that the entryman or patentee shall be entitled to a permit to prospect upon land which he has entered or patented with mineral reserved, limits that right to land upon which agricultural entry has been made. It is even stronger than the grant of section 2306, "shall be permitted," which authorizes an entry anywhere on the public domain, and which perforce is subordinate to prior rights in any specific tract of land. The other cases cited by the court in this decision support this same doctrine.

The assignment clause in section 20 does not modify the principle that the preference clause conferred a vested right and that it was inheritable. The Land Department takes this view of its application, as shown by *Fraser and Harvey*, 48 L. D. 237, in which it is explained that this clause was intended to restrict or describe the beneficiaries, and not to limit or restrict the nature of the right granted therein. The decision states:

> "I am clearly of the opinion that Congress did not intend to modify or limit the right of assignment of desert land entries conferred by existing law, or to deprive an assignee under that law of any right or privilege which said laws confer upon the original entryman.

"The foregoing is in accordance with the thought that the preference, except as to assignments made prior to January 1, 1918, is to be conferred only upon those who are required to earn title by residence, cultivation, improvement, or some other act required by the applicable law. *The widow, heirs, or devisees of a homestead entryman,* and the heirs or assignees of a desert land entryman, are the successors of the original entryman, and are within the class entitled to the preference right provided for by said Section 20, since they are allowed by law to complete the entry by compliance with the applicable statute."

IV.

Section 20 of the Leasing Act Is Mandatory.

The language used by the statute conferring the preference right, viz.: "shall be entitled to a preference right to prospect," is mandatory. Failure to comply therewith vitiates the action taken. There is no discretion which the Secretary can exercise in issuing it. The United States, speaking through the Congress has made its selection of permittee. The only duty imposed upon the Secretary was purely the ministerial one of issuing the permit to its designated permittee and lessee. Since it is assumed, for the purpose of determining this issue of jurisdiction, that petitioner had this vested property right, how can it be urged that any discretion of the Secretary is involved? If the proprietor, being in this instance the United States, as lessor, had made its selection of permittee and lessee, how can it be urged that the United States will be injured by a judicial compliance with the

terms of the law? This requirement was so essential a part of the plan that the legislative intent was frustrated by noncompliance. In our opinion, the reasoning of Judge Sibley, in *Witbeck v. Hardeman, supra,* is conclusive, and it is fully applicable in the instant case.

There is no merit in the suggestion that the Secretary's consent was required to an assignment by the permittee or lessee, and that, in the absence of his consent, any assignment by operation of law interferes with the functions of the Land Department. This question of assignment of an oil lease, in which the United States was the lessor, was passed upon by the Supreme Court of Montana in 1931, and that court dismissed such contention. We quote from that case entitled *"Hockman v. Sunhew Petroleum Corp."* 11 Pac. (2d) 778, at page 781:

> "It (a permit or lease) is unquestionably a property right, which in some instances may be very valuable, and to permit the holders of such leases to claim such property as exempt from the just demands of creditors was never intended. The United States Government would not lend itself to such fraud and from a simple reading of the Act regulating the execution of such leases it is manifest that it was within the contemplation of the law that transfers of such leases could be effected by 'judgment or decree' without the necessity of first obtaining the consent of the Secretary of the Interior."

The above decision is in accord with *Alaska Oil Felds v. Rains, supra,* and *Witbeck v. Hardeman, supra,* in which the same question was determined.

V.

The Substitution of Petitioner Would Not Interfere With the Functions of the Land Department.

On pages 18 and 19 of respondents' brief in opposition to the writ it is stated that entering a decree in favor of petitioner

> "would interfere directly with the functions of the Land Department, . . . as the Petitioner would be given a lease over an area twice as large as he would be entitled to as a matter of right, if he had in the first place had a prospecting permit."

In other words, respondents urge that petitioner was entitled to a permit and lease for only 160 acres, and not for the 320 acres embraced in his homestead. In this connection we think respondents are clearly mistaken. Where can any words be found in section 20 of the Leasing Act limiting the preference right to 160 acres? The statute provides that the entryman and patentee "shall be entitled to a preference right," and the only limitation is the acreage of the land so patented, and that it shall "not exceed 2,560 acres for the purpose of making joint application." Since the words conferring this preference right are mandatory, no discretion is involved. In accordance with the terms of the law, petitioner would be entitled to a preference right to prospect on all the lands so patented with restricted title. In case discovery of oil was made on neighboring land by another, so as to bring petitioner's land into a known geologic structure, he was entitled to a lease for his own particular land. Not only is this the clear meaning of the statute, but it has been so applied by the Land Department under such circumstances in *Matt Mechaley, supra,* from which we quote:

> "The exception as to preference lease is broad enough to include a lease under Sec. 20 of the Act, and there is no apparent reason why the fact of a discovery of oil upon a geologic structure which includes land of an entryman who, except for that discovery, would have a preference right to a permit, should operate to deprive him of all claim to the oil and gas deposits."

The sole question remains: Was petitioner entitled to a preference right to a permit and lease? If he was, then he was entitled to such permit for the 320 acres in his homestead. In determining this question, we are concerned solely with the mandatory character of the language used in the act and are not concerned with the percentage of royalty which was to be paid to the United States under the ministerial regulations subsequently adopted by the Land Department, this percentage depending in its application upon whether the discovery was made upon this particular tract, or upon an adjoining tract of land. That is a different question.

Royalties.

In announcing the theory quoted above, respondents have confused the language used in sections 13 and 14 of the act with the language used in section 20, and have not observed the clear distinction made by Congress. Section 13 of the act authorizes the granting of licenses to qualified applicants to prospect for oil upon the public domain, wherever the lands are not known to contain oil deposits in commercial quantities. In section 13, the words used—

"the Secretary is hereby authorized"—are permissive in character. In distinction, the words of section 20—"shall be entitled"—are mandatory. These provisions quite plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion. Also, the distinction between applicants for mere privileges as under section 13, and those persons who deserved special consideration in connection with rights acquired under pre-existing laws.

Petitioners' preference right to all of the 320 acres, as provided in section 20 of the act, is not modified or changed by anything contained in section 14, which states:

> "The permittee *shall also be entitled to a preference right* to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount of value of the production, and under such other conditions as are fixed for oil or gas leases in this act, the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulations prescribe." (Italics ours.)

From the above it will be observed that the discretionary power of the Secretary *relates solely* to the method of determining the royalty and not to petitioner's right to the lease itself. The mandatory provision above states that the permittee shall be entitled to a preference right for a lease to the remainder of the land in the prospecting permit. These are words of command.

Discretion.

The only discretion granted the Secretary is in the method of fixing the royalty, and not in reference to the preference right. The act fixed the royalty at not less than one-fourth the acreage within the permit upon which the discovery was actually made at five per cent, and the remainder of the acreage within the permit at not less than 12½%. The act provides discretion only to have the royalty determined by competitive bidding, or by resorting to general regulations affecting such royalties. In case of competitive bidding, the permittee had the right to equal the bid, or otherwise the preference clause becomes meaningless. In practice, the Secretary has never resorted to competitive bidding to determine the amount of royalty, nor could he do so, so long as the regulations adopted shortly after the act went into effect, and which became a part of the law, remained in force. These regulations provide, in paragraph 8 thereof, for the amount of royalties to be paid, and any permittee or lessee may rely upon this regulation as being a part and parcel of his permit:

> "Upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered . . . the permittee is entitled (a) To a lease of one fourth of the land included in the permit, on a royalty of 5 per cent, or for at least 160 acres if there be that area in the permit; (b) to a preference right to a lease for the remainder of the land covered by his permit at such royalty as may be fixed by the Secretary of the In-

terior, not less than 12½ per cent in amount or value of the production, nor more than the royalties fixed for leases under section 18 of the Act (sec. 19, par. c, of these regulations), except that on that portion of the average production exceeding 200 barrels per day per well for the calendar month, the royalties shall be 33-1/3 per cent for oil or 30 degrees Baume or over and 25 per cent for oil of less than 30 degrees Baume."

The point is, the Secretary had the discretion to choose as to whether he would fix the royalties by competitive bidding, or by a sliding scale. Having chosen the sliding scale, each permittee took his permit with the knowledge and upon the assurance that the royalties would be so calculated, and this selective method by the Secretary became, by relation and adoption, a part of the general regulations upon which all persons had the right to rely, and upon which their property rights became fixed.

Since the language granting petitioner a preference right to prospect was mandatory as to the total acreage in his homestead, the royalty he would be required to pay would be determined by the above regulations as a part of the law applicable alike to all permittees. The respondents are required to pay the United States 12½% royalty upon the 320 acres involved in this suit, in accordance with this regulation. In substituting petitioner as lessee for this land, he would pay the same amount, as a discovery was not made upon this particular section of land.

The prayer of the complaint states:

> "That defendant Pacific Western Company holds title to the hereinabove described lease for this plaintiff in so far as said lease affects the property described in this complaint."

From the above, it is self-evident that there is no interference with any discretion of the Land Department. What petitioner asks is simply a substitution in which the Secretary could exercise no discretion under the mandatory provisions of law in issuing the lease, or the regulations in fixing the amount of the royalty to be paid.

In concluding the discussion on the issue of jurisdiction, we respectfully submit that the authorities cited clearly establish that the United States is not interested in the litigation, and it is not therefore an indispensable party.

VI.

The Decision of Jurisdiction Controls Other Issues.

The Court having determined its jurisdiction and in connection therewith, that the preference right to prospect conferred by Section 20 of the Leasing Act is a vested property right *in praesenti,* it is necessary to consider briefly the far reaching effect of this determination upon other issues in this case. These questions raised on the merits are all issues of law.

As a matter of law the issue of laches which *presupposes the existence of a preference right,* is disposed of for the following reasons:

1. There is no evidence of laches in fact since respondents made no attempt to prospect on petitioner's land prior to the filing of suit on July 1, 1931.

2. Petitioner was in the undisturbed possession of his land vested with a preference right to prospect until May 11, 1933, and no question of laches could arise as a matter of law.

3. Petitioner was under no duty to act until disturbed in this possession.

Ruckman v. Cory, 129 U. S. 387;
Simmons Creek Coal Co. v. Doran, 142 U. S. 417.

4. There is no evidence that the delay of eighteen months after learning of the issuance of a lease covering his land before filing suit, resulted in any prejudice to respondents. If there was prejudice, it was of respondents' own creation.

Standard Oil v. St. Oil Co., 72 Fed. (2d) 524;
Neal v. Hodges, 13 Fed. Supp. 916.

5. Petitioner being vested with the preference right to prospect, this property right could have been divested only by compliance with the provisions of law as to notice and bond. This was not done. Hence, as a matter of law, respondents cannot invoke the defense of laches, even if there had been any laches in fact.

Not only does the decision on jurisdiction eliminate the question of laches, but it affects all the issues on the merits, as we shall see hereafter.

VII.

The Preference Right Vested Only in Entrymen and Patentees Subject to the Act of July, 1914.

The determination that the Court has jurisdiction and that there is no discretion in the Secretary since it is a vested property right, also establishes the identity of the entrymen and patentees under the law in whom this right vested. Such entrymen and patentees necessarily were subject to the Act of July, 1914, (App.), which was the only measure which restricted oil. Anything in the regulations to the contrary is invalid and without force or effect, being inconsistent with the provisions of law. In practice no such regulation has been observed. In the *Krushnic* case below, the same regulations in respect to Section 37 of the Leasing Act were held to be "in plain violation of law" in that it disregarded the mineral land laws.

U. S. v. George, 228 U. S. 14;
Wilbur v. Krushnic, 280 U. S. 306.

The preference right of Section 20 is predicated upon the provisions of this Act. This is clear both in fact and

law, since the prospecting right could not vest in an entryman or patentee unless oil was restricted at the time of entry, nor could Congress have conferred the right. Congress would have had nothing to grant, as otherwise the entrymen and patentees had title in fee. The preference right vested in entrymen and patentees with oil restricted by this law when the Leasing Act went into effect on February 25th, 1920.

Since all preference rights are predicated upon the Act of July, 1914, such right must be derived from this Act. Hence, we must look to its provisions to determine the rights of these beneficiaries. Under its provisions all entrymen and patentees acquired title to all mineral except oil. They were permitted and urged to submit evidence of the non-mineral character of their land at the time of entry, in order to acquire title to any prospective oil by receiving a supplemental or unrestricted title therefor. There is no evidence that such supplemental patents were issued as required by law. If Section 20 is to be considered a relief measure as urged by respondents, although there is nothing in the law suggesting that it is, we must look to the inequities in the administration of Section 2 of the Act of July, 1914, to find any occasions for relief. It may be considered that entrymen and patentees subject to the Act of July, 1914, who insisted that their land was non-mineral in character, and submitted convincing evidence to establish that fact, had a claim which was recognized by Congress in Section 20 in conferring a preference right to prospect upon such landowners. The purpose of Section 20 was to preserve preexisting rights. We submit that such entrymen must be recognized both in equity and as a matter of law as the true beneficiaries under the provisions of Section 20 of the Leasing Act.

No entryman or patentee under respondents' theory has a preference right to prospect under Section 20, if an executive order is construed to be a withdrawal as mineral and a classification as mineral *ipso facto* of the land affected, as urged by respondents and decreed by the trial court, contrary to the decision of this Court in the *Stockley* case cited below. This conclusion of law is assigned as error in the sixth, seventh, and sixteenth assignments [R. 335]. Such construction destroys the preference right of all entrymen affected by such orders, as we shall see hereafter. On the other hand, if the order is given its natural meaning, "for classification" or a "report of value", i. e.: "a suggestion of the propriety of an investigation", in the words of this Court, the petitioner's, as well as the rights of other entrymen, are preserved. This meaning should be applied uniformly.

Thomas Stockley (1915), 44 L. D. 178;

Stockley v. United States, 271 Fed. 632;

Stockley v. United States (1923), 260 U. S. 531, 67 L. Ed. 390;

Benjamin Kohal (1923), 49 L. D. 460;

Lane v. Hoglund, 244 U. S. 174, 61 L. Ed. 1067, at 1068.

Stated in the affirmative *the sole question at issue under Section 20 is whether petitioner's land was determined to be non-mineral in character at the time of entry* subject to the Act of July, 1914, so as to entitle him to a preference right. Respondents maintain that his affirmative right was defeated *by reason of an executive withdrawal "for classification"* issued some years prior to entry. In practice similar executive orders have not defeated the prefer-

ence right of other entrymen. Why should it do so in the instant case? This is discussed under "Respondents' theory."

Divergence of Theories.

Respondents deny the above conclusions, as we understand their theory, and assert that it was only by reason of "drastic executive orders that classified and withdrew land as mineral" at the time of entry that gave rise to equities [R. 258]. The gist of respondents' "equitable" theory is, that on the date of application, there was no *specific* oil reservation in the application of some entrymen, and because this reservation was inserted at the time of entry by virtue of these orders, such entrymen and patentees, and *no others,* are entitled to its benefits. Petitioner admits the existence of such a class of entrymen as described above, but denies that this is the class described and referred to in Section 20 as beneficiaries. We deny that this class had equitable claims or legal rights under Section 20 according to their own theory, and we deny in any event that its terms should be so narrowly construed as to *exclude* all others regardless of their just claims under the law.

As a matter of law, the above theory is not sound. The preference right to prospect granted to the homesteader in Section 20 was a vested property right *in praesenti.* It was not a grant *in futuro,* which in legal effect, would have held out an offer to the landowner to a right to prospect, if at some future time he waived title to oil in favor of the government and later made application therefor. In such a case the preference grant would not be a vested one, but a contingent interest dependent on

some future act. Respondents, therefore, deny that the preference right was a vested interest *in praesenti,* and that it was predicated upon the Act of July, 1914, restricting oil.

From an equitable standpoint, we do not see the basis for this theory. It cannot be denied that, only in case they were unlawful entrymen, were they subject to an executive order at the time of entry. (App.) It is anomalous to consider that a so-called "equity" was intended exclusively for such entrymen. It cannot be denied that all applications for the entry of public land were made subject to classification and withdrawal as mineral land throughout the time of entry by operation of the mineral land laws. The entryman would have been required to waive mineral deposits upon the land being classified as mineral. This is fundamental public land law, applied throughout the years in question. It does not make any difference whether this reservation was express or implied, so long as the classification as mineral occurred during the time of entry. Nor does it make any difference by what agency this classification was actually made. If made, entrymen were not in consequence deprived of any legal right. A clear understanding of the above facts make it self-evident that, if land was actually classified as mineral at the time of entry by a "drastic executive order", or by any agency whatsoever, or withdrawn as mineral land by operation of the mineral land laws, then such entrymen have no grievance or claim to support respondents' equitable theory. They were deprived of no legal right. In fact, the Act of July, 1914, gave them something they did not enjoy before. Congress was familiar with the long established practice of classifying land at

the time of entry. *Ergo* it recognized in Section 20 the absence of any equities in the entrymen if land was actually classified as mineral at the time of entry by an executive order or otherwise, for it explicitly provided therein that such entrymen and patentees shall not have a preference right.

In practice, respondents' theory will not stand close analysis. It cannot be denied that many entries were canceled, both before and after the Act of July, 1914, was enacted, as shown by the regulations and Land Decisions. (See 39 L. D. 145.) Subsequently, new application was made subject to the Act of July, 1914, with oil restricted, and some such entrymen have been given a preference right by virtue of Section 2 of that Act. In these cases it is apparent that oil was restricted at the date of the new application, yet if such entrymen submitted proof of non-mineral character they were entitled to the grant of the preference right. This whole situation refutes respondents' theory and confirms that of petitioner. We will discuss more fully hereafter the incongruity of respondents' theory, part of which is apparent in the following:

COMMON TERMS HAVE A COMMON APPLICATION.

It is a self-evident truth that terms found in Section 20 and Land Office practice have the same meaning and application when used in reference to the alleged beneficiaries under respondents' theory, that they have when applied to the petitioner. There is no room for disagreement on this proposition. Yet much confusion in reasoning and error in legal conclusions have arisen by failure to recognize this simple truth. With this in mind we call attention to some of the terms used in the law.

The legal and practical significance of the terms "entrymen" and "patentees" are not questioned. An entryman is one who has a *pending entry,* and is complying with the provisions of law to secure title. It is plain that, under the statute, a preference right was conferred upon both entrymen and patentees subject to the Act of July, 1914, with oil restricted, as both terms are repeatedly used by Congress. Hence, not only did this grant of a prospecting right vest in a patentee if otherwise qualified, but also vested in an entryman subject to the Act of July, 1914. This would have been true even if the word "entryman" had not been explicitly mentioned as a matter of law under the doctrine of relation. It is a well established principle that:

> "Under the doctrine of relation all the rights acquired under the patent relate back to the entry or the date when the right was created."
>
> *United States v. Detroit Co.,* 200 U. S. 321, at 324.

In the instant case the right was created on February 25, 1920, when the Leasing Act went into effect. The petitioner was an entryman at that time. It is evident that Congress recognized this doctrine of relation in the statute by specifically providing that "entrymen or patentees", and then "entrymen and patentees" with restricted patents should be entitled to the preference right. The practice of the Land Department confirms the law in this respect and prospecting permits have been issued both to entrymen and patentees subject to that Act.

We agree, further, that Congress did not intend to grant all entrymen and patentees subject to the Act of July, 1914, the preference right, since it provided a limi-

tation or exception to this class by stating that the grant should vest only in entrymen and patentees whose land was not classified as mineral land at the time of entry or stated in the affirmative was determined to be non-mineral land at that time. The clause "at the time of entry" has often been interpreted and defined by the federal courts. In many decisions it has been held that:

> "The word 'entry' means not only the preliminary application, but the proceeding as a whole to complete transfer of title."
>
> *Chaplin v. United States* (1912, 9 C. C. A.), 193 Fed. 879, at 884;
>
> *Whitman v. Spear* (1925), 103 So. 668;
>
> *McCoskell v. Herron* (1905, Iowa), 103 N. W. 988;
>
> *Dealy v. U. S.*, 152 U. S. 539, at 545;
>
> *Hastings R. R. v. Whitney,* 132 U. S. 357;
>
> *Iddings v. Burns,* 8 L. D. 226.

The Supreme Court has stated repeatedly in the above decisions that:

> "Under the homestead laws, three things are needed to be done in order to constitute an entry on public lands. First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with and the certificate of entry is executed and delivered to him, the entry is made."

Petitioner made formal application on March 6, 1919. Subsequently by affidavits showing annual cultivation of

crops and improvements over a period of five years and payment of money required, a certificate of entry was delivered to him on June 8, 1925 [R: 297]. Whether or not petitioner's land was determined to be mineral or non-mineral during this time, is the question before the Court. It was during the corresponding period of entry that respondents urge that entrymen were "threatened with destruction by drastic executive orders." That the statute being construed means "the proceeding as a whole to complete transfer of title", and not simply "the date of preliminary application", is the basis of respondents' remedial theory, and this meaning must be uniformly applied to this term. Their claim is, that during the time of entry, an oil reservation was inserted not specifically contained in the preliminary application by virtue of such orders.

In statutes words are to be given their ordinary meaning. Funk and Wagnall's, as well as other dictionaries, define "at" (the time of entry) as "during", "within", "in reference to", "present in". The antonyms given are "prior to", "before", "thereafter". In this connection it is pertinent to note that respondents urged, and the trial court found, that the statute means "prior to and at the time of entry" [R. 323]. We think what may have been done ten years prior to the date of application is irrelevant. If we accept the Court's construction, however, (although we do not agree) that the words mean both "prior to and at the time of entry", the result is the same in determining the beneficiaries under the law. The point is that it means the same thing in all instances and must be similarly applied.

It is apparent that, since the grant vested only in entrymen and patentees subject to the Act of July, 1914, and

since this Act provided in Section 2 thereof for the determination of the mineral or non-mineral character of the land during the time of entry under the Act, it could have no other meaning or application. As rights are derived from the provisions of this Act and the Act under which entry was made, we think this meaning is not open to controversy. It has always been the practice of the Land Department to determine the character of land, whether mineral or non-mineral, at the time of entry in accordance with the above definition, as this continuing period lasts usually from three to five years after the date of application. The Regulations state that the classification was made at the time of entry and that this was a "subsisting" or continuing period. Courts have confirmed this practice by recognizing that this was the preferable time for making the determination. Congress likewise has recognized this practice and provided for this determination during the period of entry, not only in Section 20, but in the Act of July, 1914, and many previous statutes. If we apply this meaning, which is the foundation of respondents' theory, to petitioner, then his patent establishes the fact conclusively that, at the time of entry, his land was found to be non-mineral. Upon this determination he unquestionably is entitled to a preference right, and no further question need be considered.

As we understand, respondents concede that petitioner is entitled to a preference right except for the executive order of December, 1910, ten years prior to petitioner's application, which "temporarily segregated the land for classification". The Geological Survey certified that the land was not classified as mineral during the intervening years [R. 158]. The Register of the Land Office states that the agricultural character had never been challenged

[R. 132] and that the Secretary had never made an adjudication of mineral character as shown by the records. The whole official record shows that it was non-mineral. (See history of land, p. 4.) Contrary to the uniform decisions of the Land Department holding that the above order imported no classification and "does not raise the presumption that the land is mineral" (Franden 50, L. D. 520) and the decree of the Supreme Court that it was not even a challenge to the agricultural character of the land involved, respondents urged, and the trial court found, in order to defeat petitioner's right, that the above words should be construed to mean that it had actually been classified as mineral land ten years prior to application and in effect, that the Secretary's determination of non-mineral character at the time of entry should be disregarded.

We submit that the above conclusion which we have assigned as error [6, 7 and 16, Assignments, R. 335] is contrary to law, and without any support. If we assume that it is correct, however, bearing in mind that this same meaning and application is to be made to all entrymen whose land was "classified and withdrawn as mineral by drastic executive orders" at the time of entry, then let us consider the legal effect of such a strained construction upon respondents' equitable theory. If the effect of such an order was to *actually* classify and withdraw as mineral the land affected, they, the entrymen, under respondents' equitable theory would have no grievance in equity, or legal right under Section 20 for their land was subject at the time of entry to such classification, regardless of the particular agency employed to do the classifying. The statute provides clearly that, under these cir-

cumstances, they shall not have a preference right. It is apparent that it is futile for respondents to apply this unique construction to an executive order as it simply defeats the purpose intended. If entrymen, however, during the time of entry, were affected by an order "for classification", and this ordinary meaning is given to the words used, their right would not be lost, as both in equity and law they would be eligible to a preference since their land in consequence would not have been classified as mineral at the time of entry by such order.

It is only by accepting the law and fact that an executive order was "for classification" as stated plainly in the order, and not a classification as mineral *ipso facto* as held by the trial court, that any entryman and patentees can be eligible for a preference right. By this means only can *any equitable theory* be reconciled with the provisions of law, the uniform decisions of the Land Department holding that an executive order was not a classification (cited hereafter), the opinion of the Supreme Court stating that it was not a challenge to the agricultural character of the land in the *Stockley* case, *supra,* and the dictates of sound reasoning. The trial court's conclusion that such an order was in itself a classification as mineral, results in eliminating the preference class. Equity follows the law in the application of the statute. *It is the very fact that it did not amount to a classification as mineral that gives any entryman an equitable claim or legal right.*

Congress recognized this situation and provided in each section of the Act of July, 1914, that a citizen may make application under that law for land alleged to be valuable (reported as valuable) with oil reserved. In this Con-

gress recognized that much of the land had never been classified or withdrawn as mineral land. If it had not so provided there could be no preference class. In practice, the Land Department has conferred a preference right under Section 20 to entrymen of such land by reason of Section 2 of that Act. The meaning of land "reported as valuable" must be uniformly applied and not be treated as a classification in order to deny petitioner his legal right. [R. 335, 8th Assignment.]

VIII.

Petitioner's Case.

QUESTION: Whether a homesteader's preference right to prospect under Section 20, on land determined to be non-mineral in character at the time of entry, is defeated by an executive order "for classification" issued prior to entry.

It is agreed that the preference right is based upon rights growing out of preexisting laws. Petitioner's right is founded upon the provisions of the Act of February 19, 1909 (App.), requiring the Secretary to find at the time of entry that such land is "actually" non-mineral in character before he may issue a patent thereunder. The patent was issued subject to the Act of July, 1914. Petitioner's affirmative rights under Section 20 are based upon the provision of these laws, which show conclusively the non-mineral character of his land at the time of entry. These rights are not defeated by an executive order temporarily suspending land "for classification" issued "prior to entry". The statement of facts contain the history of petitioner's land as found on page 4 herein and will not be repeated.

The trial court found, "that plaintiff filed application and made entry in accordance with the provisions of the Act of February 19, 1909." [R. 252.] This Act provided that the Secretary, at the time of entry, must determine that the land so entered is non-mineral, "that the land is actually of that character," and that he may not issue a patent otherwise (App. Secs. 218 and 220). This determination was not to be made in a "popular sense" by calling it "Petroleum land" as decreed by the trial court, but in compliance with the mineral land laws. [R. 252.] At that time the Register of the Land Office issued a certificate stating in effect that this land was non-mineral. [R. 296.] Petitioner made affidavit at the date of application that the land was non-mineral in character. This affidavit was corroborated by two disinterested witnesses familiar with the land in question, and a penalty was provided in case the affidavits were false. [R. 295.] The regulations of the Land Department required the entrymen further to submit this evidence and other evidence of its agricultural character.

The whole official record confirming the character of this land as non-mineral was before the Secretary. This record showed its agricultural character from the earliest time down to the time of entry and that there had never been a challenge to its agricultural character. Official records published by the Department in 1910 and again in 1916, showed it to be non-mineral. Both the Geological Survey and the Register of the Land Office certified that it was agricultural. [R. 267.] The official record showed further that this land had been classified as agricultural on June 17, 1908 and that no other classification had ever been made (App. 1), and that when other land in the same gen-

eral region had been "withdrawn as mineral land" by operation of the mineral land laws (not an executive order), it was classified as agricultural [R. 161]. One witness, however, testified at the trial that he "considered an executive order" for classification was a classification as mineral *ipso facto*. Obviously this was an afterthought as he did not consider it so in 1916 when he compiled the official record and had all the facts before him, for at that time he stated positively that it was not so classified. [R. 267.] His conclusion is contrary to the uniform decisions of the Land Department (Examples 40, L. D. 321, and 41, L. D. 145 at 147) and the decision of this Court rendered in 1927 in the *Stockley* case (*supra*). His changed position, however, is relied upon by respondents, to overcome all the facts established by the above record.

AFFIDAVITS.

If we assume, however, that none of this official record was before the Secretary, then the facts as established by the affidavits, would be fully determinative of its non-mineral character at the time of entry as a matter of law. The Land Department has stated on many occasions that the facts are proved primarily by the affidavits and that they are the basis of the entrymens' rights. The federal courts in the cases cited hereafter, have held that in the absence of a "contest or protest" the Land Department relies on the affidavits in determining the facts before issuing patents. Beginning in Volume One, Land Decisions, under the index heading "affidavits" and continuing thereafter, this practice and significance is recognized. It still holds true, as the mineral land laws have not been changed. We are not dependent on Land Office practice,

however, as the federal courts have long recognized this practice in their decisions.

In the instant case petitioner made oath that the land was non-mineral in character, and two other witnesses who were acquainted with the land likewise made oath to the same facts. Five years subsequently petitioner and two witnesses made additional affidavits as to the facts when a certificate of entry was issued. At this time the Register issued a certificate that the land was non-mineral. [R. 296.] All the statutes provide that the affidavits, when filed, shall be *prima facie* evidence of the facts stated. It is to be noted that these affidavits may not be filed on information and belief but must be based on personal knowledge. As a matter of law, the presumption of non-mineral character raised by this evidence, together with the Register's certificate of non-mineral character, overcome any possible presumption arising from a prior executive withdrawal "for classification". This presumption of non-mineral character was verified and made conclusive by the issuance of patent as a matter of law. Let us review a few of the numerous authorities. This Court confirms the above principles in the case of *Adams v. Church* (1903), 193 U. S. 510, wherein it states:

> "The affidavit required of the entryman at the time he applies is identically the same as that required at the time he makes his final proof. It is the policy of the government to require such affidavits when it intends to make it a condition precedent to granting a title."

Again in the case of *U. S. v. George, supra,* it is stated:

> "These facts, it is alleged in the indictment were matters of material inquiry of the good faith of the

> defendant in perfecting his homestead entry . . ." "The facts to be proved as required for the issuance of patent, are proved by the affidavits" . . . "In other words, the section is not only explicit as to what is to be proved, but in what manner proved; and what is required of the claimant himself, to-wit, an affidavit is distinguished from what he himself must establish by others, to-wit, two credible witnesses."

Justice Miller in *U. S. v. Minor,* 114 U. S. 232 at 240, declares that the Land Department is compelled to rely on the proof presented in the affidavits and the good faith of the entryman in meeting the requirements of the law. In effect this is repeated in the case of *Leonard v. Lennox,* 181 Fed. 760, at 764-768) and declared further that in the absence of fraud, the character of land whether mineral or non-mineral is determined in accordance with the terms of the affidavit of the entryman.

A patent is the confirmation of the record evidence, including affidavits necessary to the transfer of title and is the final judgment of the Secretary and the land officials and as such is not open to collateral attack. The above principle is well established by the following cases: *Neff v. U. S.* (1908), 165 Fed. 273, at 277; *U. S. v. Winona R. R.,* 67 Fed. 948 at 958; *Hastings and Dakota R. R. v. Whiting,* 132 U. S. 357, at 366; *U. S. v. Smull,* 236 U. S. 405; *Hawley v. Diller,* 178 U. S. 478; *State of Louisiana,* 30 L. D. 627.

Good Faith.

In our opinion the good faith of the petitioner is no longer in issue. This is a question of fact. The trial court found that petitioner acted in good faith in entering the land as agricultural land, and there is not a syllable of evidence to the contrary. [R. 252.] No appeal was taken from this finding. Respondents now urge, however, that he did not act in good faith because he did not believe that he would secure title to any prospective oil rights. To state such a novel proposition in indicative of the extreme position to which respondents are reduced to find some means of defeating petitioner in his right. We will discuss this matter briefly.

The Regulations setting forth the requirements for a preference right state in Sec. 12 thereof:

> "(2) The entry must have been bona fide under and pursuant to the act under which made"

The Act of Feb. 9, 1909, under which entry was made, provided for agricultural entry when the Secretary determined that the land was "actually" non-mineral in character. The Act of July 17, 1914, authorized this form of agricultural entry; the issuance of patent is proof of a *bona fide* entry and a *bona fide* compliance with the homestead (agricultural) laws. Can any better case of a *bona fide* agricultural entry be imagined than where the entryman waived any prospective oil right? If we consider the converse proposition it becomes self-evident that the *male fides* of an agricultural entryman would be indicated by

his refusal to do so. The law on the subject is well established. In one of the early decisions it is held in effect:

> "If the entryman has complied with the terms of the law, and the oath required of him upon making such entry, his good faith is shown and nothing will defeat his claim."
>
> *Myers v. Croft,* 80 U. S. 291-20 L. Ed. 562.

Justice Brewer states the rule succinctly in *Anderson v. Carkins,* 135 U. S. 483; in these words:

> "the facts must conform to the affidavit to show the good faith of the entryman."

Again, it is held that, "the *bona fides* of an entryman is established by his affidavit." *Williamson v. U. S.,* 207 U. S. 425 at 458. That the patent is a verification of the facts set forth in the affidavit, and the facts as well as the good faith of the entryman is established thereby is held in numerous decisions from which we cite the following:

U. S. v. Hearing (C. C., Oregon), 26 Fed. 714 at 746-749;

U. S. v. Nelson, 199 Fed. 464 at 471;

U. S. v. Morehead, 243 U. S. 607;

Hawley v. Diller, supra.

These authorities denitely dispose of the question as to whether the land was entered *bona fide* as agricultural, although there is no evidence to the contrary and the court so found.

CONCLUSIVENESS OF PATENT.

It is not open to question that the Secretary performed his duty in determining the non-mineral character of the land at the time of entry in accordance with the convincing evidence submitted by petitioner and the law under which application was made.

> "Under the rule that public officers are presumed to do their duty, the presumption is that all necessary preliminary steps have been taken and determined."
>
> *Peabody Mining Co. v. Gold,* 111 Fed. 819;
>
> *U. S. v. Beaman,* 242 Fed. 876.

The Register of the Land Office certified at the time of entry that the land was non-mineral and the patent recites [R. 300]:

> "It appears that pursuant to the Act of Congress—the claim of Jean Bourdieu has been established and duly consummated in conformity to law."

The only legal conclusion from the above is that petitioner's land was determined to be non-mineral in character at the time of entry. Congress made this requirement for land subject to entry under the law of Feb. 19, 1909, by amendment in 1915 after the Act of July was in effect, which indicates that Congress did not intend to modify the provisions of that law relative to the effect of the affidavits as evidence of non-mineral, and the duty of the Secretary in determining the "actual" non-mineral character of the land. As a matter of law, this determination would supersede any prior action to the contrary if such existed, although there was no such action.

"A decision rendered by the Land Department upon a question of fact is conclusive and not subject to be reviewed by the courts."

Johnson v. Riddle, 240 U. S. 467;

"Where a mixed question of fact and law is involved and the court cannot separate it so as to ascertain what the mistake of the law is, the decision of the Land Department is conclusive."

Whitcomb v. White, 214 U. S. 15.

Even without such conclusiveness, however, the patent would control in that from its very nature it is a confirmation and approval of the facts necessary for the entry and then its issuance. The following cases from the Supreme Court are emphatic, clear and decisive as to the binding effect, confirmation and conclusiveness of the facts set out in the patent.

St. Louis Smelting Co. v. Kemp, 104 U. S. 636 at 640;

Steel v. Smelting Co., 106 U. S. 447;

Knight v. Land Assoc., 142 U. S. 161, L. Ed., 984 and 989;

U. S. v. Oregon R. R. (9th Circuit), (1911), 186 Fed. 861 at 885;

Cowell v. Lommers, 21 Fed. 200 at 206;

Bardon v. Nor. Pac., 154 U. S. 288 at 1001, L. Ed.;

Burke v. Sou. Pac. (1913), 234 U. S. 1527 at 1547 and 1550, followed in 9th C. C. A. 277 Fed. 794;

West v. Standard Oil (1928), 278 U. S. 200 at 210.

The agricultural land laws have long provided for the reservation of any specific mineral that might be contained therein to the United States. Restricted patents are issued in derogation of the agricultural character of the land. The Act of July, 1914, and subsequent legislation enacted by Congress show that this was the policy adopted so as to conserve any specific mineral to the United States for future use, regardless of the present character of the land. In the instant case the land was at all times open to discovery and the mineral land laws remain intact. The above policy is shown by the disposition of many railroad grant lands and the Act of March 3, 1909. The public lands of Oklahoma and Kansas are subject to disposition only under the agricultural land laws, yet the Acts of July, 1914 and February, 1920, extend to these lands. The Leasing Act is held to extend to public lands reserved as national forests which are non-mineral lands (31 Op. Att. Gen. 433). Railway grants and rights of way are agricultural lands. Lease of right of way owned by the United States for oil is subject to a preference right to prospect by the railroad or adjacent owner (May 21, 1930, 46 Stat. 374). To a large part of the land subject to the Act of July, 1914, no executive order had ever issued or attached.

The fact therefore that a patent issued under a law requiring the "actual" non-mineral character of the land to be determined at the time of entry, should contain a clause reserving any oil that might be found thereafter to the United States does not make it mineral land in compliance with the provisions of the mineral land laws. Congress provided as a *sine qua non* to the preference right that the patent contain this reservation. This reservation therefore clearly cannot negative the effect of the affidavits

and other evidence, nor the legal duty imposed upon the Secretary, and the confirmation of the whole proceedings by the issue of patent. It is an axiom of the Land Department that no land can pass to patent until its character as mineral or non-mineral has been determined and that in the absence of a mineral classification, it passes to patent as agricultural land. (*Deffeback v. Hawke*), 115 U. S. 392.

Congress provided further, that entrymen, subject to the Act of July, 1914, Section 2 thereof, should submit evidence of the agricultural character of the land at the time of entry. The regulations of the Land Department required the Secretary to consider this evidence and to issue an unrestricted patent if the agricultural character was established. Petitioner submitted such evidence. The practice of the Land Department, as disclosed by its regulations, however, shows, "that notwithstanding this evidence of agricultural character", a supplemental patent in many instances was not issued, although in some cases it was waived [R. 191]. It was for this reason that Congress provided in Section 20, in effect, that, in lieu of the supplemental patent, the entrymen or patentees should have a preference right to prospect on their homesteads if patented with title restricted. If Section 20 is to be construed as a relief measure, as respondents urge then it was by reason of the inequities growing out of the administration of Section 2 of the Act of July, 1914, in failing to issue this unrestricted patent to entrymen and patentees whose land was shown to be non-mineral. This is clear since the preference right is predicated upon the provisions of this Act restricting oil, and all rights must be derived from its provisions and the law under which entry was made.

Sec. 2 of the Act of July, 1914, provided that the entryman may show by evidence that his land "is in fact non-mineral" at the time of entry. Petitioner submitted this evidence. The Secretary considered this evidence and issued a patent under the provision of the law of February, 1909, confirming the fact that this land was "actually (in fact) non-mineral in character" as a matter of law. The Land Department then applied a Regulation which provided that notwithstanding this evidence of non-mineral a supplemental patent need not be issued. The above provision of law and fact clearly establish both the equitable and legal right of petitioner under Sec. 20, and the defense offered is irrelevant to determine the issues.

IX.

Respondents' Theory.

In the preceding heading we have established the affirmative preference right of petitioner by showing that his land was determind to be non-mineral at the time of entry. Petitioner comes within the preference grant of Sec. 20, unless it is shown affirmatively that he falls within the exception provided by Congress therein. Respondents have never question his right, except in so far as it is defeated by an executive order issued prior to entry. By construing this order issued on December 30, 1910, suspending land "for classification" as a classification as mineral *ipso facto,* and which established the character of the land as mineral not only prior to entry, but also at the time of entry, they deny his right under Section 20. We will prove herein that petitioner's preference right is not defeated by this order. If executive orders issued under the Pickett Act "for reclamation," for "power

sites," or "for classification" have not precluded other patentees, why should it do so in the instant case? This proof is made by giving the same legal significance to an executive order when applied to petitioner that is given when applied to establish respondents' equitable theory. Let us consider what this theory is.

Respondents consistently have urged that the lands of certain entrymen and patentees at the time of entry, "were withdrawn and classified as mineral by drastic and stringent executive orders which threatened them with destruction" [R. 259]. They have insisted throughout that it was to remedy this situation, resulting from these "inequitable executive orders", that Congress conferred upon such beneficiaries only in Section 20 of the Leasing Act, a preference right to prospect upon such entrymen's land. The burden of their complaint upon which they predicate their equitable theory is, that this classification as mineral resulting from executive orders, was not made prior to the date of application, but was at the time of entry. The trial court accepted this theory as appears from its opinion, conclusions of law, and decree, from which we quote. The Court states [R. 258]:

> "There were areas that prior to withdrawal or classification had been bona fide entered as agricultural land and on account of the later executive orders all rights of such entrymen were inequitably and seriously impaired and threatened with destruction . . ."
>
> "It was intended to relieve bona fide agricultural entrymen from the stringent, drastic and inequitable results of executive orders, that entirely withdrew and classified lands as mineral; . . . in order to carry out its intention and relieve bona fide agricul-

> tural entrymen who had made entries or obtained patents prior to the drastic executive orders . . . Sec. 20 of the Leasing Act of Feb. 25, 1920, *vested* such persons and only such persons with the preferential or exclusive right to prospect," etc.

The Court states [R. 258] and thereafter:

> "Executive orders that entirely withdrew and classified land as mineral . . ."
>
> "Executive orders that entirely withdrew land as mineral . . ."
>
> "The lands had been withdrawn and classified as mineral . . ."

The trial court repeatedly uses the above expressions in reference to land affected at some time by executive orders, either at the time of entry or prior thereto. In the above quotations "at the time of entry", is ingeniously concealed in some instances by the statement that entry (application) was "prior to the order and classification." The only time that an entryman could have been "threatened with destruction by a drastic executive order" as stated above was at the time of entry. Referring to petitioners' land, both the conclusions of law [R. 323] and the decree [R. 327] state that such lands:

> ". . . were withdrawn and classified by said Executive Order at the time of entry and prior to the time of complainant's entry . . . the lands were withdrawn from entry as petroleum lands and were classified as such . . . and if lands are withdrawn or classified as mineral at the time of entry, there is no preference right."

"Prior to and at the time of entry . . . (the land) had been and on that date they were withdrawn from entry as *petroleum* land and were also classified as such by an executive order dated December 30, 1910." [R. 327-331.]

The above statements reported in the findings of fact, opinion, and conclusions of law and decree, emphasize that, according to respondents' equitable theory, it was drastic executive orders which classified land at the time of entry, which was the situation to be remedied. If the order was issued at the time of entry, respondents urge the entryman is entitled to relief, and if prior to entry, as in the case of petitioner, he is not. In effect, the trial court found that both periods, "prior to and at the time of entry" were embraced within the expression "at the time of entry". [R. 323.] Without agreeing with the conclusion, we will assume, for the purpose of this discussion, that this was the intendment in accordance with the Court's conclusion and decree. The point is, the same meaning must be applied in all instances. It must include after the date of application, as that is essential to maintain respondents' theory that some "drastic executive order classified them as mineral" at that time, and that this was the situation to be remedied.

OBJECTION TO RESPONDENTS' THEORY.

1. Executive Orders did not classify land;

2. Executive Orders did not issue or attach at the time of entry unless the entry was unlawful;

3. Assuming the truth of the above premises, however, it merely proves that the alleged beneficiaries did not have a preference right.

1. We will discuss these errors of law in the order stated. Executive Orders did not classify land, since they "temporarily suspended land 'for classification' ", as stated in each Order. They did not in legal effect, *ipso facto* classify land as mineral or withdraw it as mineral land, which presupposes a classification. Such temporary orders operated simply as a static agent, which held land in *statu quo,* until it could be classified by a competent fact finding agency of government. [R. 164-174.] An executive order is fiat. A classification of land under the mineral or non-mineral land laws involved a determination of fact as to known mineral value. The manner in which these orders were issued affecting millions of acres in blanket form, often unsurveyed, before anyone had been on the land, makes it obvious that as to such lands there had been no determination of facts. The uniform decisions of the Land Department hold that the purpose of the order was to enable the Department to classify it at some future time, as stated plainly in the order, and the practice shows it. [R. 158-170.] These decisions cover the whole period from 1900 to 1916.

Johnson v. Northern Pacific (1911), 40 L. D. 321;
Holmes v. Kinsey (1912), 40 L. D. 557, at 558;
Jennie Tschirgi (1912), 41 L. D. 319, at 320;
Albert Woodhouse, 41 L. D. 145, at 147;
William Moses (1915), 41 L. D. 483, at 484;
George Frandsen (1924), 50 L. D. 516, at 520;
Benj. Kohal (1923), 49 L. D. 460.

The above decisions and many others show the uniform practice in this respect. Bulletin No. 623, printed in 1916,

containing all withdrawals, shows in every instance that the investigation or classification of the land was made subsequent to the issuance of the order. In the *Kohal* case above, in conformity with this Court's decision in the *Stockley* case, it was held that inclusion in a so-called "petroleum reserve" did not impress the land with mineral character. The practice of issuing withdrawals "for classification" is shown in the appendix by an order issued in 1935. The evidence is, that in all these orders involved herein the only classification possible was as mineral or non-mineral. In the instant case, both the Geological Survey and the Register of the Land Office certified that there had never been a challenge to the agricultural character of petitioner's land at any time. As a simple proposition of law, the first requisite to sustain respondents' theory is without any support in law or in fact. Bearing in mind that the same meaning must be applied in all instances, it is inconceivable that respondents should attempt to read into the words "for classification" an actual classification as mineral, when the only possible result of such construction is that these alleged beneficiaries can have neither an equitable or legal preference right in consequence.

2. The second premise is equally erroneous, as executive orders did not issue or attach at time of entry unless the entry was unlawful. All executive orders for classification were issued under the authority of the Pickett Act of June 25, 1910 (App.), which specifically provided: "There shall be excepted from the force and effect of any executive order, all lands embraced in any *lawful* homestead entry or upon which any valid settlement has been made." The Secretary stated in each order, that it was issued in strict accordance with the provisions of the

above Act, and there is no evidence to the contrary. The evidence shows that if there was an agricultural entry within the outer bounds of a blanket executive order, it was treated as a nullity and restored since it could not attach or affect the entry, as a matter of law.

Not only in law but also in fact, such "entrymen and patentees" were not affected by executive orders. There were twelve exhibits introduced in evidence [Nos. 15-27, R. 137 and 150-158] in which entrymen had received a preference right to prospect under Section 20, although their land was not affected by an executive order either "prior to or at the time of entry". No such orders were ever issued. This is convincing proof that executive orders did not classify land as mineral at the time of entry. It shows the fallacy of respondents' "equitable" theory for if these entrymen were entitled to a preference right, it was not by reason of "drastic executive orders that classified and withdrew their land as mineral" during the time of entry. Whatever was done was by operation of the mineral land laws to which they were subject at the time of entry. They became subject to the Act of July, 1914, by a "report of value" an allegation which has a well-defined legal meaning and is, in the words of this Court, "a suggestion of the propriety of an investigation" and not a classification.

It is clear therefore that these lands were not classified and withdrawn as mineral by an executive order as no such order existed. If they were classified and withdrawn as mineral at the time of entry by operation of the mineral land laws (or any agency), it is obvious that the preference permits in the above exhibits were issued contrary to Sec. 20. *In practice, therefore, the Secretary did*

not consider a "report of value" as an actual mineral classification as the respondents insisted in applying the term to petitioner. He gave it the legal meaning, the meaning that the Supreme Court gave it in *Lane v. Hogland,* and the *Stockley* case, *supra.* The 8th Assignment should be sustained. [R. 335.]

As stated above, if entrymen were affected by executive orders at the time of entry, or if such orders attached, it was only in case the entry was "unlawful" as provided in the Pickett Act, the sole authority for such orders. Exhibits Nos. 6-14 [R. 137, 142-148] represent entrymen whose land was subject to an outstanding executive order under the Pickett Act prior to the time of entry and which remained in effect at date of application [R. 144] who received a preference right to prospect under Section 20 of the Leasing Act. They illustrate that a temporary executive order was not a bar to a preference right if the entryman was otherwise qualified. These entrymen had made an unlawful entry on account of the provisions in the reclamation law. Subsequently, at the time of entry, another executive order "for classification" was issued and attached to their land because they were "unlawful" entrymen [R. 144]. As stated in the order, this formed the basis for a mineral waiver under the Act of July, 1914, "subject to the entrymen's right to prove at a hearing that the lands are in fact non-mineral" as provided for all entrymen subject to that law in Section 2 thereof.

We submit that *the land of these nine homesteaders who received a preference right, were affected by executive orders, both prior to and at the time of entry.* It is self evident, therefore, that if such orders *ipso facto,* "classified and withdrew their land as mineral" such

preference rights were issued in violation of Section 20. *If an executive order issued "for classification" at the time of entry did not defeat the preference right of these homesteaders, how can such an order issued ten years prior to entry defeat the petitioner?*

Obviously in issuing them by reason of Section 2 of the Act of July, the *Land Department recognized the difference between an order which segregated land according to a "popular meaning" by calling it "petroleum land", and an actual classification as mineral.* It is the difference between an allegation, report of value, or an expert's guess on the one hand, and a genuine classification in compliance with the mineral land laws on the other. If there is no distinction these homesteaders had no equitable claim or legal right under Section 20. *If there is a difference, they had both.* The decree is contrary to law in this respect [R. 337, 16th Assignment]. *By the same token, petitioner's right must be appraised. The practice, therefore, shows that an executive order at all times was simply a segregation "for classification"* and "not a challenge to the agricultural character of the land", in accordance with the decisions of the Land Office, and the opinion of this Court in the *Stockley* case (*supra*).

Upon applying the terms of respondents' theory to these facts, it is evident that Congress did not intend that a bare executive order should defeat the preference right. These instances prove conclusively that an executive order did not classify land as mineral, that the existence or non-existence of such an order did not determine an entry-

man's preference right. They prove that if the entryman had a claim it was by reason of Section 2 of the Act of July, 1914, which gave him a right to prove his land non-mineral. Failure to issue a supplementary patent in case of this proof is the sole equitable basis for the preference right.

3. In the face of this irrefutable evidence, even if we assume the correctness of respondents' premises 1 and 2, viz.: that the land of these alleged exclusive beneficiaries at the time of entry was classified as mineral by drastic executive orders, then it is obvious that they have succeeded only in proving that such entrymen and patentees were not entitled to a preference right since they would come within the express prohibition of Section 20. No authority need be cited for the proposition that a construction which renders a statute absurd should not be adopted. A theory or practice which negatives the explicit provisions of the law cannot be given any credence and must be rejected.

If the land of these alleged beneficiaries was withdrawn and classified as mineral by drastic executive orders at the time of entry contrary to law and all the evidence, and the negative "not" is to be stricken from the law, the same reasoning would apply to petitioner and he would have a preference right under this same theory. Needless to say, the statute means the same thing in all instances. If it is to be given the application "prior to and at the time of entry", as urged by respondents and repeatedly stated in their conclusions of law, in order to establish a

basis for their equitable theory, and the negative "not" is left in the statute, then obviously they have not only excluded the petitioner, but all other beneficiaries from the preference grant. They have proved by this means that there is no preference class. Prior to the Act of July, 1914, many entries had been cancelled under the mineral land laws (not by an executive order). Many of these entrymen made new application upon the enactment of the Act of July, 1914. Some have received a preference right by reason of Section 2 thereof. Respondents' theory clearly would exclude them as oil was restricted prior to date of their new application (39 L. D. 145). There is no legal basis for urging that the statute means only "prior to", and not "at the time of entry". Even respondents' theory is not so elastic as to permit them to insist that the words "prior to" should be inserted and the clause "at the time of entry" omitted. It is elementary in the construction of statutes that the intent must be found in the words of the Act, that no words may be inserted, nor may other words be omitted in an attempt to give effect to some alleged secret intent not contained therein. Such construction is judicial legislation and is invalid.

We think the premises upon which respondents' theory is predicated is without support in law or fact. If assumed to be true as a basis for so-called equitable claims, however, it is in direct violation of what Congress provided. Clearly this theory must be rejected, as courts may not give effect to a theory which negatives the express terms of the statute.

X.

Construction of Statute.

The issues of this case are determined by the construction of a statute. In considering the terms of this statute, we are not at liberty to disregard the limitations and exceptions found therein by omitting some words and inserting others, as there is a conclusive presumption that Congress intended to make no other exceptions. Nor can we negative the terms of the statute by giving effect to an equitable theory urged by respondents and accepted by the trial court, that "the preference right was intended exclusively for those entrymen whose land (at the time of entry) was classified as mineral by drastic executive orders", and not for entrymen whose land was suspended for classification prior to date of application. This is at variance with Land Office practice and the terms of the law. The provisions of the law are to be applied in like manner throughout. The entryman must have been subject to the Act of July, 1914, with oil restricted as all preference rights are predicated upon its terms and the law under which entry was made.

The *literal* meaning of the statute is plain and free from ambiguity. The general clause "as mineral at the time of entry" modifies both antecedents, "withdrawn or classified." The negative "not" modifies both "withdrawn or classified." It is impossible to depart from this literal meaning, since "at the time of entry" is the very basis of respondents' equitable theory, and the action of which

they complain, in urging that it was some drastic executive order at the time of entry which classified the lands as mineral.

The trial court both on demurrer and in its opinion held, in effect, that the literal meaning must be applied, and that no ambiguity is involved [R. 251]. In practice a qualified withdrawal is necessary to defeat a preference right. The only qualification in the statute is, "as mineral at the time of entry". This literal meaning is applied by the Land Department as it holds that "where the land is classified or withdrawn as mineral," it is subject to cancellation [R. 147]. (*Cleveland Johnson,* 48 L. D. 18, reversed by *Stockley* case.) In practice the Land Department granted a preference right although there was an outstanding executive order for reclamation, power sites, or for classification (Instructions, 48 L. D. 164), as shown by exhibits (*Alvina L. Kamen,* 48 L. D. 628). The practice, however, has not always been uniform in this respect.

Not only in fact but in law, there is no legal basis for departing from this literal meaning, "Withdrawn as mineral land at the time of entry," is an expression as old as the land office. The practice was used as early as 1865. It was used in 1908 in reference to land in this same general region, when other land was "withdrawn as mineral land" by operation of the mineral land laws (not an executive order) after it had been classified as mineral, and at that time petitioner's land was excluded as it had been classified as agricultural. The official record shows that this is the only classification ever made. "Classified as mineral at time of entry" is a well known term in public land procedure as it is customary to classify land during

this time, and Congress is familiar with this practice. The legal principle involved is frequently stated:

> "Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all."
>
> *Johnson v. So. Pac.* (1904), 196 U. S. 369, at 370;
>
> *United States v. Standard Brewery* (1920), 251 U. S. 10;
>
> *Porto Rica R. R. v. Mor* (1921), 253 U. S. 245;
>
> *Great West. R. R. v. Swindon* (1885), 9 App. cases 808;
>
> 59 *Corpus Juris* 986.

The only purpose or result of departing from this literal meaning and application would be to inject ambiguity.

> *Wabash R. R. v. United States*, 178 Fed. 5, at p. 11;
>
> *United States v. Mo. Pac. R. R.* (1927), 278 U. S. 269;
>
> *Iselin v. United States* (1925), 270 U. S. 245.

Ambiguity may not be created by departmental misconstruction, nor may any practice or theory be recognized when it is wholly lacking in uniformity and obviously negatives the explicit provisions of law.

There is no ambiguity in the terms used by Congress. The most that can be urged is that there is some uncertainty in the extent of the preference class since each case is *sui generis*. Respondents seek an inconsistent and narrow construction, inconsistent in that it does not apply

uniformly the terms of their own equitable theory. In effect, they urge that there was a secret purpose not found in the Act and that this secret purpose should be recognized by the Court in order to exclude petitioner, and to include others not within the meaning of the words used. In substance, this is to contend that a narrow meaning should be applied in order to exclude petitioner as a beneficiary, and that a broad, distorted meaning, which goes so far as to negative the words used, should be applied to admit other entrymen and patentees under respondents' equitable theory. Regardless of any secret purpose, courts can give effect only to what Congress provided.

If we accept respondents' contention that Section 20 is a relief measure, then, as a matter of law, it is to be liberally construed to accomplish its purpose and correct the mischief. "Liberally construed means to embrace all cases fairly within its scope, resolving all reasonable doubts in favor of the applicability of the statute to the particular case."

Black's Law Dictionary;

Glen Falls Cement Co. v. Van Wert, 228 N. Y. S. 289;

Estate of Patterson, 155 Cal. 626.

It has long been the policy of the federal courts to apply the above doctrine for the protection of the rights of homesteaders. There can be no doubt that Congress intended that it should be so applied in this instance.

Conclusion.

Petitioner has advanced the only equitable theory which is compatible with the provisions of law, as it is based upon the Act of July, 1914, restricting oil subject to which all beneficiaries must derive their rights. No valid objection has been offered to this theory. It insists that the same meaning be applied to the clause "as mineral at the time of entry" in relation to petitioner, as is applied by respondents to establish a basis for their equitable theory. It requires that the ordinary significance and effect of an executive order "for classification" be applied in all instances, and not a fantastic meaning "that it classifies and withdraws all land as mineral", which would eliminate the preference class completely. It will be conclusively presumed, as a matter of law, that there is a preference class.

There can be no question that the beneficiaries of Section 20 are only entrymen and patentees subject to the Act of July, 1914. There can be no question that many entrymen subject to that Act did submit evidence that established that their land was non-mineral under Section 2 of that Act, as the Regulations show that this was done. There can be no question that petitioner offered proof of the non-mineral character of his land at the time of entry. It cannot be questioned that the affidavits, the basis of his rights, and other evidence as disclosed by the official record of non-mineral character, was before the Secretary. It cannot be questioned that as a matter of law in the absence of a contest or protest this evidence was conclusive. It cannot be questioned, that the Secretary assumed all the responsibilies of his office and made the determination of non-mineral and that the land was actually of this character at the time of entry as the patent verifies.

If non-mineral at that time, it could not have been mineral as the terms are mutually exclusive. The patent cannot negative the facts set forth in the affidavits. The Secretary was required to make the finding of non-mineral character at the time of entry, under the terms of the law of February 19, 1909, as well as Section 2 of the Act of July, 1914. We must conclude that this duty was performed as the patent is not open to collateral attack.

Wherefore it is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed with costs to petitioner.

Respectfully submitted,

JEFFERSON P. CHANDLER,
HOWARD W. WRIGHT,
ARCHER B. DORMAN,
Solicitors for Petitioner,
631 Van Nuys Building,
210 West Seventh St.,
Los Angeles, California.

APPENDIX.

PAGE 371 OF OFFICIAL BULLETIN 623 PUBLISHED 1917 BY DEPARTMENT OF INTERIOR, AFFECTING LAND IN ISSUE.

INDEX.

"In the following index every order of withdrawal, classification or restoration affecting lands in a township is given under the date on which the order was approved."

Page 385—

"T. 21 S. R. 17 E.—

		Page
Withdrawal	Aug. 15, 1907	102
Classification	June 17, 1908	105
Withdrawal continued	July 10, 1908	107
Restoration	July 10, 1908	107
Withdrawal	Sept. 27, 1909	135
Withdrawal confirmed	July 2, 1910	183
Withdrawal	Dec. 30, 1910	237"

EXECUTIVE ORDER.

WITHDRAWAL FOR CLASSIFICATION OF ALL PUBLIC LAND IN CERTAIN STATES.

WHEREAS, the act of June 28, 1934 (ch. 865, 48 Stat. 1269), provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and

WHEREAS, in furtherance of its purposes, said act provides for the creation of grazing districts to include an aggregate area of not more than eighty million acres of vacant, unreserved and unappropriated lands from any part of the public domain of the United States; provides for the exchange of State owned and privately owned lands for unreserved, surveyed public lands of the United States; provides for the sale of isolated or disconnected tracts of the public domain; and provides for the leasing for grazing purposes of isolated or disconnected tracts of vacant, unreserved and unappropriated lands of the public domain; and

WHEREAS, said act provides that the President of the United States may order that unappropriated public lands be placed under national-forest administration if, in his opinion, the land be best adapted thereto; and

WHEREAS, said act provides for the use of public land for the conservation or propagation of wild life; and

WHEREAS, I find and declare that it is necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act;

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 481, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, it is ordered that all of the vacant,

unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

The withdrawal hereby effected is subject to existing valid rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

FRANKLIN D. ROOSEVELT.

10 a. m., E.S.T.
November 26, 1934.

STATUTES.

GENERAL LAND LAWS.

It is provided in the Preemption Act of 1841 and the Homestead Act, incorporating the same provision, of 1864:

"No lands on which are situated known salines or mines shall be liable to entry."

Preemption Act, Sept. 4, 1841 (5 Stats. at Large, 456).

"No mineral lands shall be liable to entry and settlement under the provisions of the Homestead laws."

Sec. 2302, *Revised Stats.;*
Compiled Statutes 1901, p. 1410;
(6 Fed. Stat. Ann. 321).

MINERAL LAND LAWS.

The Act of May 10, 1872, commonly referred to as the Placer Act, to all intents and purposes constitutes the present system under which the mineral laws are administered. It is therein provided:

"In all cases lands valuable for minerals shall be *reserved from sale*, except as otherwise expressly directed by law."

Sec. 2318, *Revised Statutes*, Title 30, Chap. 2, Sec. 21, U. S. C. A.

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States."

Sec. 2319 (U. S. Comp. St. 1901, p. 1424).

Act of Feb. 19, 1909.

Sec. 218, Title 43, U. S. C. A.

ENLARGED ENTRIES OF CERTAIN NONMINERAL, NONIRRIGABLE LANDS IN CERTAIN STATES. (a) Any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivision, under the provisions of this section, in the States of Arizona, California, Colorado, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming, three hundred and twenty acres, or less, of *nonmineral,* nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided,* That no lands shall be subject to entry under the provisions of this Act* until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply. (35 Stat. 639.)

Sec. 220, Title 43, U. S. C. A.

APPLICATIONS FOR ENTRY OF LANDS NOT DESIGNATED AS SUBJECT TO ENTRY AND FOR ADDITIONAL ENTRY OF CONTIGUOUS LAND. Where any person qualified to make entry under the provisions of the second preceding section, shall make application to enter under the provisions of said sections any unappropriated public land in any State affected thereby which has not been designated as subject to entry under the section (provided said application is accompanied and supported by properly corroborated affidavit of the applicant in duplicate, showing prima facie that the land applied for is of the character contemplated by said section), such application, together with the regular fees and commissions, shall be received by the register of the land district in which said land is located, and suspended until it shall have been determined by the Secretary of the Interior whether *said land is actually of that character;* that during such suspension the land described in said application shall be segregated by the said register and not subject to entry until the case is disposed of; and if it shall be determined that such land is of the character contemplated by the said section, then such application shall be allowed; otherwise it shall be rejected, subject to appeal. (Sec. 1, 38 Stat. 1162.) (Italics supplied.)

---

*March 4, 1915.

PICKETT ACT.

Act of June 25th, 1910.

Section 141. Withdrawal and reservation of lands for Water-power sites or other purposes.

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

All lands withdrawn under the provisions of this and the preceding section shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: Provided, That the rights of any person who, at the date of any order of withdrawal, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: Provided further, That this and the preceding section shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June 25, 1910.

And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this and the preceding section all lands

which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: And provided further, That no national forest shall be created, nor shall any additions be made to one created, prior to August 24, 1912, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. (June 25, 1910, c. 421, sec. 2, 36 Stat. 847; Aug. 24, 1912, c. 369, 37 Stat. 497.)

Leasing Act.

Feb. 25, 1920 (S. 2775).

An Act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That deposits of coal, phosphate, sodium, oil, oil shale, or gas and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this Act to citizens of the United States.

Sec. 20. In the case of lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under railroad grant, the entryman or patentee, or assigns, where

assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entryman and patentees or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres, for the purpose of making joint application. Leases executed under this section and embracing only lands so entered shall provide for the payment of a royalty of not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled under section 14 hereof.

[Section 21 relates to oil shale.]

Act of July 17, 1914.

An Act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to

prospect for, mine, and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: *Provided,* That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.

SEC. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal

of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: *Provided,* That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located *are in fact nonmineral in character.*

SEC. 3. That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same. (38 Stat. 509.)